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FEDERAL ELECTION COMMISSION

999 E Street, N.W.
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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 6125

DATE COMPLAINT FILED: October 31, 2008

DATE OF NOTIFICATION: November 7, 2008

LAST RESPONSE RECEIVED: December 1, 2008

DATE ACTIVATED: March 24, 2009

EXPIRATION OF SOL: October 22, 2013

COMPLAINANT:

Todd Stenhouse, Campaign Manager for Charlie Brown for Congress

RESPONDENTS:

McClintock for Congress and David Bauer, in his official capacity as treasurer Representative Tom McClintock

RELEVANT STATUTES
AND REGULATIONS:

2 U.S.C. § 431(22)

2 U.S.C. § 431(24)

2 U.S.C. § 441d

11 C.F.R. § 100.26

11 C.F.R. § 100.28

11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter arises out of a complaint alleging that Tom McClintock and his principal campaign committee, McClintock for Congress and David Bauer, in his official capacity as treasurer ("Committee"), placed automated calls to voters that advocated McClintock's election, advocated the defeat of his opponent, Charlie Brown, and failed to include a disclaimer. In its response, the Committee admits to having placed automated calls to voters in California's 4th Congressional District advocating the election of McClintock, but denies that the calls advocated

1 the defeat of Brown or that the calls omitted a disclaimer. Complainant submitted recordings of
2 three of these calls revealing that the candidate identifies himself at the start of a recorded
3 message, but the message does not state who paid for the communication. However, along with
4 its response to the complaint, the Committee submitted a recording of the call at issue that does
5 include a disclaimer at the end of the call that states "[t]his message is paid for by McClintock
6 for Congress."

7 We invited counsel for the Committee to provide any information that may explain the
8 discrepancy between the recording he submitted and those submitted by the Complainant. In
9 response, counsel submitted a sworn affidavit by Representative Tom McClintock asserting, *inter*
10 *alia*, that the recording previously submitted to the Commission was the one the Committee
11 approved for dissemination by its vendor. See Attachment 1.

12 Based on the available information, it appears that some of the Committee's automated
13 calls distributed to the public failed to include a full disclaimer. However, as discussed in further
14 detail below, based on the circumstances surrounding the apparent violation of the disclaimer
15 provisions of the Federal Election Campaign Act of 1971, as amended ("the Act") and the
16 Commission's regulations, we recommend that the Commission dismiss the allegations against
17 Representative Tom McClintock and McClintock for Congress and David Bauer, in his official
18 capacity as treasurer, as a matter of prosecutorial discretion. See *Heckler v. Chaney*, 470 U.S.
19 821 (1985). We also recommend that the respondents be cautioned to take steps to ensure that
20 appropriate disclaimers are included in future communications transmitted on their behalf,
21 pursuant to 2 U.S.C. § 441d and 11 C.F.R. § 110.11.

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II. FACTUAL AND LEGAL ANALYSIS

A. Factual Summary

Tom McClintock was the Republican candidate for California's 4th Congressional District during the 2008 election cycle. McClintock's campaign committee placed automated calls to voters in the 4th District in October 2008 advocating his election. See Complaint; Committee Response at ¶ 1. According to the complaint, however, those calls failed to include the proper disclaimer pursuant to the Commission's regulations at 11 C.F.R. § 110.11. Complaint at 4-5. In support of the allegation, the complaint included recordings of three phone messages containing the Committee's automated message. *Id.* at Exhibit A. The recordings contain the following message:

Hi, this is Tom McClintock. The federal government already spent hundreds of billions of dollars on bailouts. Now Nancy Pelosi and her friends want to spend over 3 trillion dollars on new programs and Charlie Brown's right there with her committed to every dime of it. You and I can't afford that. Worse, our children and grandchildren don't deserve the bill either. You knew me for years. I have battled for fiscal sanity in California. I'll wage the same fight in Washington.

The complaint details the receipt of three phone messages containing the Committee's automated message transcribed above by three separate individuals on October 22, 2008. Complaint at 2-4. One such call was received at the campaign offices for candidate Charlie Brown and was heard by the campaign manager/complainant. The complaint also alleges that the same automated call was received by individuals named Hank Raymond and Alan Shuttleworth. Each of these automated calls was recorded by the recipients' answering machines, and the recordings appear to be complete copies of the messages that were received. For instance, one of the complainant's recordings starts and ends with the following system messages: "First saved

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1 message sent Wednesday, October 22, at 5:59 p.m." and "End of Message," respectively.

2 Further, the complainant attests that the recordings provided with the complaint were "a full and
3 complete copy of the automated call[s]" that were received. Complaint at 2-3.

4 The Committee also submitted a recording of the call at issue along with its response to
5 the complaint.] Committee Response at Exhibit A. That recording is otherwise identical to
6 those submitted by the complainant, but ends with the statement "[t]his message is paid for by
7 McClintock for Congress," which raises the question whether the recording that the respondents
8 provided to the Commission was an exact copy of what was transmitted on or about
9 October 22, 2009.²

10 In order to aid the Commission's analysis of this matter, we sought to reconcile the
11 discrepancies between the respective recordings submitted by the parties. We sent a letter
12 inviting counsel for the Committee to "provide any information you may have regarding the
13 discrepancy between the audio recordings provided by Complainant, which have no audible
14 disclaimer, and the recordings you submitted." In response, Representative McClintock
15 submitted a sworn affidavit acknowledging he recorded the automated call at issue. See
16 Attachment 1 at ¶ 2. In addition, he explains that during the course of his campaign, he recorded
17 a separate disclaimer and that the Committee's vendor, Dane & Associates, was instructed to
18 disseminate the automated call with his recorded disclaimer. *Id.* at ¶¶ 1, 3. Dane & Associates
19 reportedly provided a recording to the Committee containing the final version of the automated

² It appears that McClintock's campaign provided the same recording to the news media shortly after the complaint was filed in this matter. See Ben van der Meer, *Brown Campaign files FEC Complaint over McClintock robocall disclaimers*, Oct. 30, 2008, <http://www.politicker.com/california/4079/brown-campaign-files-fec-complaint-over-mcclintock-robocall-disclaimers> (last accessed 4/15/2009).

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1 call, which contained the disclaimer.³ The respondents submitted a copy of that recording to the
2 Commission as part of their response to the complaint. *Id.* at ¶ 4.

3 **B. Analysis**

4 The complaint raises the question whether the Committee's automated calls contained the
5 appropriate disclaimer, as required by the Act and the Commission's regulations. The Act
6 requires that when a political committee "makes a disbursement for the purpose of financing any
7 communication through any broadcasting station, newspaper, magazine, outdoor advertising
8 facility, mailing, or any other type of general public political advertising," they must place a
9 disclaimer in the communication identifying the authorized political committee that paid for the
10 communication. 2 U.S.C. § 441d(a)(1). Such disclaimers must be presented in a "clear and
11 conspicuous manner" in order to give the listener "adequate notice of the identity of the person or
12 political committee that paid for and, where required, that authorized the communication."
13 11 C.F.R. § 110.11(c)(1).

14 The Commission's regulations further specify that disclaimers are required in "[a]ll
15 public communications, as defined in 11 C.F.R. § 100.26, made by a political committee."
16 11 C.F.R. § 110.11(a)(1). A "public communication" is defined in the Act and the
17 Commission's regulations as a "communication by means of any broadcast, cable, or satellite
18 communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone
19 bank to the general public, or any other form of general public political advertising." *See*
20 2 U.S.C. § 431(22); 11 C.F.R. § 100.26.

³ Dane & Associates, Inc. now works with other companies under the name "Automated Calling," which specializes in providing "high[] quality pre-recorded message delivery services and accurate survey results." <http://www.automatedcalling.com>.

1 The automated calls at issue in this matter require disclaimers because they are a
2 "telephone bank to the general public" and "general public political advertising." See MUR
3 5401, Factual and Legal Analysis for Texans for Henry Cuellar and Certification dated March 7,
4 2007 (concluding that "robocalls" can require disclaimers). The calls appear to qualify as a
5 "telephone bank to the general public," defined as "more than 500 telephone calls of an identical
6 or substantially similar nature within any 30-day period." 2 U.S.C. §§ 431(24); 11 C.F.R.
7 § 100.28. Telephone calls are substantially similar when they "include substantially the same
8 template or language, but vary in non-material respects such as communications customized by
9 the recipient's name, occupation, or geographic location." 11 C.F.R. § 100.28. Except for the
10 missing disclaimer, the automated calls placed on behalf of the Committee in this matter
11 contained identical language. *Supra* at 3. Because of the size of California's 4th Congressional
12 District, with a population of 578,022,⁴ and the assertions by both the complainant and the
13 respondents that the calls were made within one day, on or about October 22, 2008, it is likely
14 that the calls were made to over 500 voters within a 30-day period. 2 U.S.C. § 431(24);
15 11 C.F.R. § 100.28. In addition, the Committee's 2008 Post General Election Report discloses a
16 disbursement made on October 22, 2008 (the day the automated message may have been
17 transmitted to voters) in the amount of \$7,799.13 to Dane & Associates for the purpose of

⁴ The population estimate noted above includes only persons 18 years of age and over, as indicated on the U.S. Census Bureau's website. See *Fast Facts for Congress, Congressional District 4, California - Fact Sheet*, <http://factfinder.census.gov/home/cws/main.html>.

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1 "Phone Banks."⁵ Thus, based on the timing of the calls, the size of the district, the use of a
2 vendor, and the costs, it is reasonable to infer that over 500 calls were made. Further, because
3 the calls were funded and authorized by a political candidate just prior to his election, and they
4 advocated the election of McClintock and the defeat of opponent Charlie Brown, the automated
5 calls are a form of general public political advertising to which the disclaimer requirements
6 would apply. *Supra* at 3. Therefore, it appears these calls required a disclaimer that disclosed
7 the committee that paid for the communication.

8 The recorded message provided with the Committee's response to the complaint discloses
9 who paid for the communication at the end of the message by stating that "[t]his message is paid
10 for by McClintock for Congress." See Committee Response at Exhibit A. Although the
11 Committee and the candidate assert that they understood that this was the version of the
12 recording (containing the disclaimer) that their vendor was to disseminate to voters, the
13 recordings submitted with the complaint demonstrate that at least three calls were transmitted
14 without the disclaimer. Thus, it is possible that an error was committed by the vendor during
15 transmission of the calls.

16 In recent cases involving possible vendor error, the Commission has declined to pursue
17 the alleged violations. For instance, in MUR 5991 (U.S. Term Limits), the Commission
18 dismissed the disclaimer allegations because of confirmed vendor error. See Certification dated
19 March 6, 2009 and Factual and Legal Analysis for U.S. Term Limits at 7 (explaining that the
20 vendor acted without the committee's authorization and the committee took prompt remedial
21 action). Similarly, in MUR 5775R (Deborah Pryce for Congress), the disclaimer allegations

⁵ Although it is likely that the pre-recorded call that is the subject of this complaint is included in this vendor payment, it is not known whether the \$7,799.13 in costs include any other calls or services.

1 were dismissed based on the committee's response, which included a letter from the vendor
2 confirming that it inadvertently cut off the first few seconds of the advertisement that contained
3 the "stand by your ad" statement by the candidate). *See* Certification dated October 25, 2007 and
4 Factual and Legal Analysis. Finally, in MUR 5580 (Alaska Dem. Party) the Commission found
5 reason to believe, but took no further action other than to admonish the committee based on
6 sworn declarations from a committee representative and a vendor representative that the original
7 mailing included the required disclaimer, but that it was inadvertently deleted during production.⁶
8 *See* MUR 5580, First General Counsel's Report dated August 24, 2005 and Certification dated
9 August 30, 2005.

10 We do not have an explanation from Dane and Associates regarding why some of the
11 automated calls may have been transmitted without a disclaimer. Additionally, the recordings
12 submitted with the complaint contradict the respondents' assertions that the final version of the
13 automated message authorized by the Committee did contain a disclaimer. However, the only
14 way to conclusively determine whether any of the automated calls failed to contain the requisite
15 disclaimer would be to open an investigation. In light of the respondents' sworn assertions, the
16 small amount in violation, and the likelihood that any omission was the result of vendor error,
17 we do not believe it would be an efficient use of the Commission's resources to investigate this
18 matter. Accordingly, we recommend that the Commission exercise its prosecutorial discretion to
19 dismiss the allegations against Representative Tom McClintock and McClintock for Congress
20 and David Bauer, in his official capacity as treasurer, and issue a cautionary letter recommending

⁶ MUR 5580 was decided prior to the Commission's issuance of a *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12545 (March 16, 2007), that clarified that dismissal is appropriate when the evidence is sufficient to support a reason to believe finding, but the circumstances do not warrant the additional use of the Commission's resources.

that they take steps to ensure that appropriate disclaimers are included in future communications transmitted on their behalf, pursuant to 2 U.S.C. § 441d and 11 C.F.R. § 110.11. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

III. RECOMMENDATIONS

1. Dismiss, as a matter of prosecutorial discretion, the allegations that Representative Tom McClintock and McClintock for Congress and David Bauer, in his official capacity as treasurer, violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11, and send a cautionary letter.
2. Approve the appropriate letters.
3. Close the file.

Thomasenia P. Duncan
General Counsel

6-22-09
Date

BY:

Kathleen M. Guith
Kathleen M. Guith
Deputy Associate General Counsel for
Enforcement

Peter G. Blumberg
Peter G. Blumberg
Assistant General Counsel

Ana J. Peña-Wallace
Ana J. Peña-Wallace
Attorney

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